



# 10 Costly Mistakes to Avoid When Planning for Your Special Needs Child

Robert P. Bergman Attorney at Law

This Article examines the unique planning requirements of families with children, grandchildren or other family members (such as parents) with special needs. There are many misconceptions in this area that result in costly mistakes in planning for these special needs beneficiaries. The following are ten of the most common “costly mistakes” that can be made when planning for beneficiaries with special needs.

## **COSTLY MISTAKE #1: Disinheriting the child.**

Many disabled people rely on SSI, Medicaid (MediCal in California) or other government benefits to provide food and shelter. You may have been advised by otherwise well-meaning individuals or advisors to “disinherit” your disabled child - the child who needs your help most - to protect that child’s government benefits. But these government benefits rarely provide more than basic needs, and this “solution” does not allow you to help your disabled child after you become incapacitated or deceased. When a child requires, or is likely to require, governmental assistance to meet his or her basic needs, parents, grandparents and others who love this child need to consider establishing a Supplemental Needs Trust.

***Planning Tip for Parents:*** *It is unnecessary and in fact poor planning to disinherit a special needs child. If you have a special needs child or other beneficiary, you need to consider a Supplemental Needs Trust to protect public benefits and care for the child during your incapacity or after your death.*

## **COSTLY MISTAKE #2: Procrastination.**

Because none of us knows when we may die or become incapacitated, it is important that you plan for a beneficiary with special needs early, just as you should for other dependents such as minor children. However, unlike most other beneficiaries, a special needs child may never be able to compensate for a failure to plan. A minor beneficiary without special needs can obtain more resources as he or she reaches adulthood and can work to meet essential needs, but a special needs child may never have that ability.

***Planning Tip for Parents:*** *Parents, grandparents, or any other loved ones of a special needs child face unique planning challenges when it comes to that child. This is one area where you simply cannot afford to wait to plan.*

## **COSTLY MISTAKE #3: Failure to coordinate a planning team effort.**

It is critical that special needs planning be conducted, as much as possible, with a team of advisors:

- ✓ an attorney who is experienced in this planning area;
- ✓ a life insurance agent who can ensure that there will be enough money to maintain the benefits for the special needs child;
- ✓ a CPA who can advise on the Supplemental Needs Trust’s tax return;
- ✓ an investment advisor who can ensure that the trust fund’s resources will last for the child’s lifetime, and;
- ✓ other key advisors that may support the goals of the trust going forward, such as a Care Manager for the child...

“10 Costly Mistakes to Avoid When Planning for Your Special Needs Child”

Law Offices of Robert P. Bergman, 1777 Saratoga Avenue, Suite 208, San Jose, CA 95129 (408) 247-0444

**Planning Tip for Parents:** *Special needs planning dictates that you have advisors that work together to ensure that there are sufficient trust assets to care for your child throughout his or her lifetime.*

**COSTLY MISTAKE #4: Ignoring the special needs when planning for the child's benefit.**

Planning that is not designed with the child's special needs in mind will probably render the child ineligible for essential government benefits. A properly designed Supplemental Needs Trust promotes the special needs person's comfort and happiness without sacrificing eligibility.

Special needs can include medical and dental expenses, annual independent check-ups, necessary or desirable equipment (for example, a specially equipped van), training and education, insurance, transportation, and essential dietary needs. If the trust is sufficiently funded, the disabled person can also receive spending money, electronic equipment & appliances, computers, vacations, movies, payments for a companion, and other self-esteem and quality-of-life enhancing expenses: the sorts of things you may now provide to your child or other special needs beneficiary.'

**Planning Tip for Parents:** *When planning for a special needs child, it is critical that you use a Supplemental Needs Trust as the vehicle to pass assets to that child. Otherwise, those assets may disqualify the child from public benefits and may be forced to be used to repay the state for the assistance provided.*

**COSTLY MISTAKE #5: Creating a "generic" Supplemental Needs Trust that doesn't fit.**

Even some "Supplemental Needs Trusts" are unnecessarily inflexible and generic. Although an attorney with some knowledge of the area can protect almost any trust from invalidating the child's public benefits, many trusts are not customized to the particular child's needs. Thus the child fails to receive the benefits that you provided when you were alive.

Another frequent mistake occurs when the Supplemental Needs Trust includes a "pay-back" provision rather than allowing the remainder of the trust to go to others upon the death of the special needs child. While these "pay-back" provisions are necessary in certain types of Supplemental Needs Trusts, an attorney who knows the difference can save your estate hundreds of thousand of dollars, or more.

**Planning Tip for Parents:** *A Supplemental Needs Trust should be customized to meet the unique circumstances of your child and should be drafted by a lawyer familiar with this area of the law.*

**COSTLY MISTAKE #6: Failure to properly "fund" and maintain the plan.**

When planning for your special needs child, it is absolutely critical that there are sufficient assets available for your special needs beneficiary throughout his or her lifetime. In many instances, this requires utilization of a funding vehicle that can ensure liquidity when necessary. Oftentimes permanent life insurance is the perfect vehicle for this purpose, particularly if you are young and healthy such that insurance rates are low.

Also, because this is an ever-changing area, it is also imperative that you revisit your plan frequently to ensure that it continues to meet the needs of your special needs beneficiary.

**Planning Tip for Parents:** *You should consider permanent life insurance as the funding vehicle for your special needs beneficiaries, particularly when your beneficiary is young, given the often staggering costs for your beneficiary's care over your beneficiary's lifetime.*

*If your estate may be subject to estate tax upon your death (which may be difficult to determine given the constantly-changing estate tax exemptions), you should consider having an Irrevocable Life Insurance Trust own and be the beneficiary of the life insurance policy on your*

*life. The Irrevocable Life Insurance Trust, in turn, would then name your child's Supplemental Needs Trust as a beneficiary of the insurance trust.*

*Alternatively, in a non-taxable situation, you might consider naming your own revocable living trust as the beneficiary of the life insurance in order to help equalize inheritances between your children if that is the your objective.*

### **COSTLY MISTAKE #7: Choosing the wrong trustee.**

During your lifetime, you can manage your child's Supplemental Needs Trust. When you are no longer able to serve as trustee, you can choose who will then serve as trustee according to the instructions that you have provided. You may decide on a team of advisors and/or a professional trustee. Whomever you choose, it is crucial that the trustee is financially savvy, well-organized, and, of course, ethical.

***Planning Tip for Parents:** The trustee of a Supplemental Needs Trust should understand your objectives for your special needs child and be qualified to manage and invest the assets in a manner most likely to meet those objectives.*

### **COSTLY MISTAKE #8: Failing to invite contributions from others to the trust.**

A key benefit of creating a Supplemental Needs Trust now is that your special needs child's extended family and friends can make gifts to the trust or remember the trust as they plan their own estates. For example, these family members and friends can name the Supplemental Needs Trust as the beneficiary of their own assets in their revocable trust or Will, and they can also name the Supplemental Needs Trust as a beneficiary of life insurance or retirement benefits.

***Planning Tip for Parents:** Creating a Supplemental Needs Trust now allows others, such as grandparents and other family members, to name the trust as the beneficiary of their own estate planning.*

### **COSTLY MISTAKE #9: Relying on siblings of your special needs child to use their money for your special needs child's benefit.**

You may be relying on your other children to provide for the need of your special needs child from their own inheritances. This can be a temporary solution for a brief time, such as during your brief incapacity if your other children are financially secure and have money to spare. However, it is not a solution that will protect your special needs child after you have died or when your special needs child's siblings have their children, expenses and financial priorities.

What if the inheriting sibling divorces or loses a lawsuit? His or her spouse (or a judgment creditor) may be entitled to half of it and will likely not care for your special needs child. What if the sibling dies or becomes incapacitated while your special needs child is still alive? Will the sibling's care for your special needs child as thoughtfully and completely as the sibling did?

Siblings of a special needs child often feel a great responsibility for that child and have felt so all of their lives. When you provide clear instructions and a helpful structure, these lessen the burden on all of your children and support a loving and involved relationship among them.

***Planning Tip for Parents:** Relying on siblings to care for a special needs beneficiary is a short-term solution at best. A Supplemental Needs Trust ensures that the assets are available for the special needs beneficiary (and not the former spouse or judgment creditor of the sibling) in a manner intended you.*

### **COSTLY MISTAKE #10: Failing to protect the special needs child from predators.**

An inheritance from parents who fund their child's Supplemental Needs Trust by Will rather than by revocable living trust is in the public record. Predators are particularly attracted to vulnerable beneficiaries, such as the young and those with limited self-protective capacities.

When you plan with trusts rather than a Will, you decide who has access to the information about your children's inheritance rather than the legal system. This protects your special needs child and other family members, who may be serving as trustees, from predators.

***Planning Tip for Parents:*** *A Supplemental Needs Trust created outside of a Will ensures that information about the inheritance is not in the public record, protecting the special needs beneficiary from predators.*

## **CONCLUSION**

Planning for special needs beneficiaries requires particular care and the participation of all of your wealth planning advisors. A properly drafted and funded Supplemental Needs Trust can ensure that your special needs child has sufficient assets to care for him or her, in a manner intended by you, throughout the beneficiary's lifetime.

You may request a free consultation concerning your special needs child by calling The Law Offices of Robert P. Bergman at (408) 247-0444, or visiting our website at [www.lawbob.com](http://www.lawbob.com).

*Robert P. Bergman is a San Jose estate planning attorney and counselor who devotes his law practice exclusively to assisting individuals and couples plan for incapacity and the eventual transfer of their property to their heirs. Bob is a Certified Specialist in Estate Planning, Trust & Probate Law (California State Bar Board of Legal Specialization), and he specializes in working with parents who have minor children. Bob presents monthly living trust seminars at his office at 1777 Saratoga Avenue, Suite 208, San Jose, CA 95129, entitled “**The Living Trust Seminar: Inheritance Planning for You and Your Family in 2011.**”*

*Visit his website at [www.lawbob.com](http://www.lawbob.com) where you can learn more, get on his e-mailing list, register for an upcoming seminar, schedule a consultation, and read other articles on estate planning topics that Bob has written. You may also visit his companion website at [www.lawbob.net](http://www.lawbob.net) for additional articles, and an online living trust seminar. You can also reach him by e-mail at [rpb@lawbob.com](mailto:rpb@lawbob.com) or by telephone at (408) 247-0444. All inquiries are confidential.*

*This article is intended to provide general information about estate planning ideas, concepts, and laws, and is not to be relied upon as rendering legal advice about your particular situation. No attorney-client relationship is created by this article. The laws concerning estate planning, wills, trusts, and estate taxes are very complex, often state-specific, and change on a regular basis. Consult with an experienced attorney before taking any action that would affect your personal or business matters.*